No. 275.
By of Atty. Gen'l Van Devanter
for Appellees.
Filed Oct. 18, 1902.

Office Supreme Court U. S.
FILED
OCT 18 1902
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

LONE WOLF, ETC., APPELLANTS,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, ET AL., APPELLEES.

No. 275.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

LONE WOLF, PRINCIPAL CHIEF OF THE KIOWA tribe of Indians; Eshitie, principal chief of the Comanche tribe of Indians; White Buffalo, Ko-Koy-Taudle, Mar-Mo-Sook-Cer-Wer, Nar-Wats, Too-Wi-Car-Ne, William Tevis, and Delos K. Lonewolf, all members of the Kiowa, Comanche, and Apache tribes of Indians, appellants,

v.

ETHAN A. HITCHCOCK, SECRETARY OF THE Interior, William A. Jones, Commissioner of Indian Affairs, and Binger Hermann, Commissioner of the General Land Office, appellees.

No. 275.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

The appellant, Lone Wolf, filed his bill (subsequently amended by the addition of other complainants) in the supreme court of the District of Columbia, asking that the appellees be restrained from carrying into effect the act of Congress approved June 6, 1900 (31 Stat., 672, 676), amending and ratifying an agreement with

the Comanche, Kiowa, and Apache tribes of Indians, whereby the Indians ceded to the United States their interest in and claim to certain lands described in the agreement, and also from carrying into effect the act of March 3, 1901 (31 Stat., 1093), making further provision as to the manner of disposing of the lands so ceded. (Record, pp. 7–16 and 19–25.)

An application for a temporary injunction was denied, the opinion of Justice Bradley given thereon being in the record (pp. 26–34).

The defendants demurred to the bill (record, p. 34) upon the following grounds:

> 1. Said bill of complaint, with the amendment thereto, is bad in substance, and does not state facts sufficient to entitle the complainants, or either of them, to the relief prayed for or to any relief.
>
> 2. The court has no jurisdiction over the subject-matter of the suit.
>
> 3. The complainants, as individual members of said Indian tribe, are without title to the relief prayed for or to any relief.

This demurrer was sustained and a decree entered dismissing the bill. (Record, p. 35.) From that decree appeal was prosecuted to the court of appeals of the District of Columbia, which affirmed the lower court (Record, pp. 37–44), and afterwards overruled a motion for reargument. (Record, pp. 46–47.) From the judgment of affirmation this appeal is prosecuted.

During the pendency of these proceedings the appellants instituted a like suit in the courts of Oklahoma,

where the lands in question are situate, against the local representatives of the Secretary of the Interior, in which suit Justice Irwin, of the supreme court of that Territory, reached the same conclusion as that announced by Justice Bradley, of the suppreme court of the District of Columbia, in the suit at bar and entered a decree dismissing the bill.

A statement of the conditions which led to and made necessary the legislation assailed by appellants is given in the concluding subdivision of this brief.

POINTS AND ARGUMENT.

EFFECT OF THE DEMURRER.

The rule as to the effect of a demurrer and as to the matters which are admitted thereby to be true is so clearly and concisely stated in a recent decision of the court of appeals of the District of Columbia (*Maese* v. *Herman*, 17 App. D. C., 52, 59) that we quote it here. That statement is:

> It is a well-settled principle in the law of demurrer that, while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant, or other document, or official act that may be insisted upon by the pleader, as the foundation

> of his claim and title, or that may be set up in opposition thereto. That is matter of law for determination by the court. These propositions are too clear to require citations of authority for their support.

The averments in this bill, which amount to statements of the legal effect of any law or document or act of an officer of the Government, of which the court takes judicial notice, are not admitted. There are also facts of which the court takes judicial notice, in the absence of any allegation or even in the face of an allegation setting forth a different state of things. (Daniels's Chancery Pleading and Practice, vol. 1, p. 522, 5th ed.)

In the case of *Knight* v. *U. S. Land Association* (142 U. S., 161, 168–169), Justice Lamar, in the statement of the case, said:

> To understand precisely the exact nature of the questions involved in this case a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings, and are recited in former decisions of this court, statutes of the United States, and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice.

The dealings of the Government with the Indian tribes within the geographical limits of the United States, but no part of the body politic, form such an important phase of the political history of the country and its development that the courts will take judicial

notice of those dealings, as shown by acts of Congress, public documents printed by authority of Congress, orders and proclamations of executive officers, and the records of the Interior Department.

THERE ARE CERTAIN RULES WHICH THE COURTS WILL OBSERVE IN CASES INVOLVING THE VALIDITY OF AN ACT OF CONGRESS.

This is a proceeding to secure a declaration from the courts that the act of Congress of June 6, 1900 (31 Stat., 672, 676), is unconstitutional and of no effect. The courts are asked to say that a coordinate branch of the Government has exceeded its powers. That, this court is ever reluctant to do, and in such cases will resolve every doubt in favor of the validity of the statute. The position assumed by this court as early as 1810 was defined by Chief Justice Marshall, in *Fletcher* v. *Peck* (6 Cranch, 87, 128), in the following words:

> The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and

> strong conviction of their incompatibility with each other.

The rule is again stated by Chief Justice Waite in *Sinking Fund cases* (99 U. S., 700, 718), as follows:

> It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

This has been recognized as the settled rule of construction in many other cases, among them being *Powell* v. *Pennsylvania* (127 U. S., 678, 684); *Angle* v. *Chicago, St. Paul, etc., Railway* (151 U. S., 1, 18); *Chicago and G. T. Ry. Co.* v. *Wellman* (143 U. S., 339, 346); *United States* v. *Old Settlers* (148 U. S., 427, 466); *Nicol* v. *Ames* (173 U. S., 509, 514–515).

As stated in Cooley's Constitutional Limitations (6th ed., p. 217), the rule to be deduced from the authorities is as follows:

> The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity and with a just desire to keep within

> the restrictions laid by the constitution upon their action, have adjudged that it is so. They are a coordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment.

In such cases the courts have no authority to inquire into the motives of the legislators or as to the expediency of the legislation, the inquiry being limited to the question of power. In *McCulloch* v. *Maryland* (4 Wheaton, 316, 423), after finding that the law there under discussion provided an instrument necessary as a means to effect legitimate objects of the Government, it was said:

> But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal,

> should a case requiring such a decision come before it, to say that an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the Judicial Department and to tread on legislative ground. This court disclaims all pretensions to such a power.

In *United States* v. *Des Moines Navigation and Railway Company* (142 U. S., 510, 544) the court quoted with approval a passage from Cooley's Constitutional Limitations as stating the correct rule. It was there said:

> * * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the navigation company by false representations and threats of suits, but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th ed., 222) the author, citing several cases, observes: "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which

this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed, and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon."

In *Angle* v. *Chicago, St. Paul, etc., Railway Co.* (151 U. S., 1, 18) the decision in *Fletcher* v. *Peck* (*supra*) was quoted from, and it was said:

> * * * The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the coordinate departments of the Government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly.

The rule is again laid down in *Lindsey & Phelps Co.* v. *Mullen* (176 U. S., 126, 146).

The allegations made in the bill of complaint and the grounds upon which it is asked that said act of June 6, 1900, be declared unconstitutional and void, present matters which might have been properly presented to and considered by Congress when the measure was under consideration there, but they are not matters which the courts will consider in a proceeding attacking the validity of that legislation. It is shown by the bill that all the matters and things presented in support of the allegation that said act is invalid were as a matter of fact brought to the attention of Congress and urged against the proposed legislation while it was under consideration there. The agreement was acted upon by the Indians in 1892, but was not acted upon by Congress until 1900. There is no room, in view of these facts, to say that the action finally taken was hasty and ill-considered. After deliberate consideration the Congress concluded they had authority to enact that law, and the courts will be very reluctant, upon the same facts and with no new element presented, to say that the coordinate branch of the Government was wrong. The subject-matter here is one coming clearly within the scope of Congressional action, and, as a matter of fact, the allegations of the bill go only to the expediency of the measure or the means used to procure the Indians' assent to the agreement which forms the basis upon which Congress acted. These were matters for the sole and exclusive con-

sideration of the legislative body. The courts have no concern with them, and will not inquire into them.

The position taken by this court as to its duty in such cases is clearly stated by a passage in the decision in *Luther* v. *Borden* (7 How., 1, 47) and quoted in *Taylor and Marshall* v. *Beckham* (178 U. S., 548, 580), as follows:

> The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums.

It is respectfully submitted that a consideration of the questions presented here will involve this court in a discussion properly belonging to the legislative branch of the Government, and which has been held there and the questions involved decided. Upon these grounds alone the decree below should be affirmed.

THE INDIANS ARE WARDS OF THE UNITED STATES AND AS SUCH ARE UNDER THE CARE AND CONTROL OF THE POLITICAL BRANCH OF THE GOVERNMENT.

Section 441, Revised Statutes of the United States, provides:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Third. The Indians.
>
> * * * * *

Section 463 reads:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

In the early history of the country the Indian tribes were recognized as independent powers to the extent that treaties were negotiated with them. After a long trial it became evident that this manner of dealing with them was not suited to the changing conditions, and was wholly inadequate to secure the proper administration of Indian affairs. A new policy, that of governing them by acts of Congress, was determined upon and announced by the act of March 3, 1871 (16 Stat., 544, 566), which contained a provision, afterwards carried into the Revised Statutes as section 2079, as follows:

> *Provided*, That hereafter no Indian nation or tribe within the territory of the United States

> shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

The authority of Congress to prescribe this manner of dealing with the affairs of the Indians has never been seriously questioned and the legislation has been frequently referred to by this court without any intimation of a doubt as to the power of Congress in the premises. See *United States* v. *Kagama* (118 U. S., 375, 382); *Choctaw Nation* v. *United States* (119 U. S., 1, 27); *Cherokee Nation* v. *Southern Kansas R. R. Co.* (135 U. S., 641, 655); *Stephens* v. *Cherokee Nation* (174 U. S., 445, 483).

Even while the political branch of the Government was according to these nations and tribes that degree of recognition as independent peoples involved in the practice of negotiating treaties with them, the courts had begun that long line of decisions which has definitely declared their status as that of dependent communities, subject in all matters relating to their government, civilization, and support to the paternal supervision and control of the United States. In the earlier decisions they were recognized as having some attributes of distinct political communities, but even then it was declared that they lacked many essential attributes of independent nations. In *Johnson* v.

McIntosh (8 Wheaton, 543), decided in 1823, after pointing out that the European powers had agreed that discovery gave title to the country by whose subjects or authority it was made, and gave the exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, it is said (p. 591):

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and can not be questioned. So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly can not be rejected by courts of justice.

In other decisions they are spoken of as dependent nations in a state of pupilage. In *Cherokee Nation* v. *Georgia* (5 Peters, 1–17) Chief Justice Marshall, after concluding that they could not with accuracy be denominated foreign nations, describes their status in the following language:

* * * They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the President as their Great Father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility.

With the increasing white population the Indians were pushed farther to the west, and the lands left for their occupancy constantly became less in extent. This condition of affairs brought them into closer contact with the whites. It was demonstrated that the Indian was absolutely incapable of protecting himself in his new surroundings or of determining what was for his advantage. The usual result which follows in the meeting of two opposing forces occurred here, and the weaker had to give way to the stronger. To afford the Indian that protection which the laws of humanity demanded should be given him, and to prevent as far as possible the evil consequences to both parties which

would necessarily flow from the clash between civilization and savageism, it was necessary that the Government should intervene and assume complete control over the Indians. The condition of affairs and the necessities arising out of that condition are graphically set forth by Justice Miller, speaking for the court, in *United States* v. *Kagama* (118 U. S., 375, 383–384), where it is said:

> * * * These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
>
> * * * * *
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographic limits of the

United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The relationship between the United States and the Indian tribes is very clearly stated, and the power of Congress to control them by legislative enactment is distinctly asserted in *Choctaw Nation* v. *United States* (119 U. S., 1, 27), where it was said:

> In reviewing the controversy between the parties presented by this record it is important and necessary to consider and dispose of some preliminary questions. The first relates to the character of the parties and the nature of the relation they sustain to each other. The United States is a sovereign nation, not suable in any court except by its own consent and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable, under the terms of the Constitution, of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

Counsel for appellants assert that the only change effected by this act of March 3, 1871, was as to the manner of ratification by the United States. This position is not sustained by the language used. The words import a change in the system of treating with and governing the Indian tribes—the inauguration of a new policy. Speaking of this act this court has said: "Congress has determined upon a new departure—to govern them by acts of Congress" (*United States* v. *Kagama*, 118 U. S., 375, 382). Again, the Indians are "subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power" (*Choctaw Nation* v. *United States*, 119 U. S., 1, 27); and again, "the policy of the Government, however, in dealing with the Indian nations was definitely expressed in a proviso inserted in the Indian appropriation act of March 3, 1871" (*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 483).

That Congress may have chosen in certain instances since then to authorize the negotiation of agreements with Indians does not in any way modify or detract from the force and effect of said act. The failure of Congress to exercise any legislative power vested in that body or to exercise it in any specified manner does not destroy the power or foreclose resort to the specified manner when occasion arises for its use. *Chicago, Burlington and Quincy Railroad Company* v. *Iowa* (94 U. S., 155, 162).

While sentimentality may characterize the exercise of absolute authority over the affairs of the Indians as an arrogation of power because of might, yet the exigencies of the situation demanded its assumption and results have justified it. The principle has been so firmly established that its existence must be recognized as no longer subject to question.

The view of the subject taken by the executive branch of the Government is shown in a recent veto message of President McKinley, who approved the legislation here in question (see Congressional Record, vol. 33, part 6, p. 5132, Fifty-sixth Congress, first session), where it is said:

> *While the Indians are the wards of the Government and must submit to that which is deemed for their best interests by the sovereign guardian*, they should, nevertheless, be dealt with in a manner calculated to give them confidence in the Government and to assist them in passing through the inevitable transition to a state of civilization and full citizenship.

Nor is the power of the General Government over the persons and property of its Indian wards one which can be surrendered or contracted away. In *Stone* v. *Mississippi* (101 U. S., 814, 820) it is said:

> But the power of governing is a trust committed by the people to the Government, no part of which can be granted away. The people in their sovereign capacity have established their agencies for the preservation of the public health and the public morals and the protection of public and private rights. These several

> agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they can not give away or sell the discretion of those that are to come after them in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

THE MAKING OF TREATIES A POLITICAL FUNCTION.

The scope of the jurisdiction of the several departments of the Federal Government is clearly defined, and one may not interfere with another acting in its proper sphere. The relations between this country and other governments or peoples are to be determined by treaties, agreements, or laws, and the political branch has full authority to determine, declare, or agree what these relations shall be. The proposition that the political functions of the Government shall be performed free from control or interference by the judiciary is so elementary in character and its recognition so essential to the stability of our present system that a mere statement of it seems to be sufficient.

In the case of *The Amiable Isabella* (6 Wheat., 1, 71, 72) the court had under consideration the Spanish treaty of 1795, which provided that in certain cases passports should be made out according to the form annexed thereto. As a matter of fact, no form had been annexed to the treaty. The court was asked to pass upon the form used in that case, but refused to do so upon the ground that such action would be adding to the treaty; and in this connection Justice Story said (pp. 71, 72):

* * * In the first place, this court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power and not an exercise of judicial functions. It would be to make and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter, and, having found that, our duty is to follow it so far as it goes and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind. * * * In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty or to take away any qualification or integral part of any stipulation upon any notion of equity or general convenience or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty, equally give the rule to the judicial tribunals.

In *Doe* v. *Braden* (16 How., 635) the court had under consideration the treaty with Spain by which

Florida was ceded to the United States. In the ratification of this treaty, signed by the King of Spain, it was declared that certain grants theretofore made by that country were thereby annulled. It was contended that the power to annul these grants did not rest in the King, and that if it existed anywhere in the Spanish Government it resided in the Cortes, and that consequently the grants had never been effectually annulled. The court refused to open that question, and in the course of the opinion said (p. 656):

> But these are political questions and not judicial. They belong exclusively to the political department of the Government.
>
> By the Constitution of the United States the President has the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. And he is authorized to appoint ambassadors, other public ministers, and consuls, and to receive them from foreign nations, and is thereby enabled to obtain accurate information of the political condition of the nation with which he treats, who exercises over it the powers of sovereignty and under what limitations, and how far the party who ratifies the treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion by treaty stipulations. And the Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land.
>
> The treaty is therefore a law made by the proper authority, and the courts of justice have

> no right to annul or disregard any of the provisions unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the Government to conduct our foreign relations with any advantage to the country and fulfill the duties which the Constitution has imposed upon it if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

The proper department of the Government having once determined that a treaty has been properly executed, it becomes the supreme law of the land, and the courts can not inquire into any alleged informality in its execution. In another part of the opinion in *Doe* v. *Braden* the court used the following language (p. 657):

> * * * It was for the President and Senate to determine whether the King, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to and governed by their laws. And as the treaty is by the Constitution

> the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and can not sanction any title not derived from the United States.

The same rule has been applied to treaties with Indian tribes. In *United States* v. *Brooks* (10 How., 442) the suit was brought in pursuance of a joint resolution of Congress directing the institution of such legal proceedings as might be necessary "to vindicate the right of the United States to Rush Island, which is alleged to have been improperly included in the limits of the lands ceded by the Caddo Indians to the United States by the treaty of the 1st of July, 1835, and reserved by said treaty in favor of certain persons named Grappe." By that treaty, which was negotiated by Jehul Brooks as commissioner for the United States, the Indians ceded certain lands described by metes and bounds, and in a supplemental article it was provided that a tract, to contain 4 square leagues, should be taken out of the lands so ceded and conferred upon Grappe and his sons. Afterwards it was represented that the land so reserved had never been a part of the Caddo lands, and that Brooks, the commissioner for the United States, and who claimed the land by purchase from Grappe, had fraudulently procured it to be included in the tract ceded by the Indians. The court held that the treaty passed the title to the tract to Grappe as fully as a patent would have done; that Brooks, being

the alienee of Grappe, could hold it against any claim of the United States, and said (p. 459):

> We have nothing to do, in our consideration of the case, with the conjectural intimations, which were made in the argument of it, concerning the influences which were used to secure the reservation or the designs of the Commissioner in having it done.

The case of *Fellows* v. *Blacksmith* (19 How., 366) involved a treaty between the United States and certain Indians residing in the State of New York, by which their lands in New York were to be sold and the Indians were to be removed to other lands in the West to be provided for them. A contention was made there, like the one here, that the treaty had not been properly negotiated in that one of the bands was not represented in the negotiations and therefore never assented to the terms of the treaty. In speaking of this the court said (p. 372):

> An objection was taken on the argument to the validity of the treaty on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and headmen of the band in the negotiations and execution of it. But the answer to this is that the treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress. (1 Cranch, 103; 6 Pet., 735; 10 How., 442; 2 Pet., 307, 309, 314; 3 Story Const. Law, 695.)

If the court could not inquire into the alleged irregularity in that case, much less will any court inquire into the alleged irregularity in this case, where it appears that the contention now made, that the requisite number of Indians did not sign the agreement, was presented to Congress before the passage of the ratifying act. It must be presumed that this contention was investigated, and that the investigation satisfied Congress that it was without foundation in fact. Whatever opinion this court may entertain as to the correctness of the conclusion reached is wholly unimportant. The judiciary has no power to make the inquiry and substitute its judgment for that of Congress.

It has been definitely settled that there is no authority in the courts created by the Constitution, whose jurisdiction can neither be enlarged or diminished by legislative authority, to consider and determine whether a treaty or act of Congress has been procured by fraud or duress. While special tribunals created by act of Congress may be clothed with extrajudicial powers, yet it has been held of acts which from their wording seem to confer the greatest possible latitude of inquiry that Congress did not thereby submit the good faith of its action or the action of the Government to judicial decision. The case of *United States* v. *Old Settlers* (148 U. S., 427) was instituted under an act of Congress of January 25, 1889 (25 Stat., 694), conferring upon the Court of Claims jurisdiction to try the cause and determine what sum of money, if any, was due the Indians from the United States

under any treaty or act of Congress, and declaring it to be "the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined, and to try and determine all questions that may arise in such cause on behalf of either party thereto and render final judgment thereon." In the petition in that case it was alleged that certain lands had been conveyed to the Western Cherokees, known as the Old Settlers, by the United States; that subsequently a part of said lands was, by force and fraud upon the part of the United States, given to the Eastern Cherokees, and (p. 430):

> * * * that from that time and continually thereafter the Western Cherokees protested against and resisted this invasion of their rights until in 1846, when, acting under duress of life, liberty, and property, advantage being also taken by the United States of the fiduciary relations existing toward the Western Cherokees, and also of the condition of extreme impoverishment, destitution, and want to which the Western Cherokees had been reduced by the United States, they were forced to make and enter into an agreement with the United States fraudulent in character, by the terms of which the consideration they were to receive was grossly inadequate to compensate them for their right to and interest in the lands of which they had been unjustly deprived by the United

> States, and for the property destroyed and lost to them through the wrongful acts of the United States and its default to comply with its treaty obligations. * * *

The Court of Claims' view of the jurisdiction so conferred upon it is stated by this court as follows (p. 466):

> The Court of Claims declined to go behind the treaty of 1846, upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an act of Congress had been procured by duress or fraud, and declare it inoperative for that reason. (*Fletcher* v. *Peck*, 6 Cranch, 87, 130; *Ex parte McCardle*, 7 Wall., 506, 514; *People* v. *Draper*, 15 N. Y., 545, 555; *Railroad Company* v. *Cooper*, 33 Penn. St., 278; *Wright* v. *Defrees*, 8 Indiana, 302.)
>
> And while it was conceded that Congress might confer upon that court extrajudicial powers, yet the court was of opinion that this could not be held to have been done by the act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the complainants or defendants, might be appealed to the Supreme Court, whose jurisdiction, as defined by the Constitution, was strictly judicial, and could neither be enlarged nor diminished by legislative authority. (*Gordon* v. *United States*, 2 Wall., 561; Taney, C. J., 117 U. S., 697, Appx.; *In re Sanborn*, *ante*, 222.)

The case of *United States* v. *Arredondo* (6 Peters, 691) was cited by petitioners there in support of the

contention that under the act of jurisdiction the treaty of 1846 was to be considered as a contract between private parties. A similar contention is in effect made here. This court, after stating what was involved and decided in the Arredondo case, said (468):

> It will be perceived that that decision is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution, nor does any such question arise in the case before us. There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846 (or any other), and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the Government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference.

The case of *United States* v. *Choctaw Nation* (179 U. S., 494) was instituted under the provisions of the act of March 2, 1895 (28 Stat., 876, 898), conferring upon the Court of Claims jurisdiction to hear and determine the matter, the intention being, as therein expressed, "to allow said Court of Claims jurisdiction

so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim." In speaking of the effect of this act and defining the extent of jurisdiction thereby conferred, the court, speaking through Justice Harlan, said (p. 532):

> Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing.

The language in the jurisdictional acts involved in the cases just cited is apparently as broad as human ingenuity could devise. It certainly embraces every phase of every question that could arise in connection with the claim involved. It is sufficiently comprehensive to make the jurisdiction conferred thereby coextensive with the authority of Congress to grant jurisdiction to the courts. If, therefore, that language failed to invest the Court of Claims with authority to inquire whether a treaty had been procured by fraud, duress, or unfair dealings, the supreme court of the District of Columbia had no authority under the act establishing it and defining its jurisdiction to inquire in this case whether the agreement here was properly negotiated.

The act of 1871, declaring that dealings with the Indian tribes should no longer be conducted by way of treaties, did not make those dealings any less political in character or take them out of the exclusive control of the political branch of the Government. Whether those dealings be by way of treaty or, as in this case, by way of agreement, the declaration of Congress in the premises and its action thereon is conclusive. The allegation in this bill that the requisite number of members of the Comanche, Kiowa, and Apache tribes of Indians never assented to the cession of the lands in question does not present any question which may be inquired into by the courts, and must, therefore, be disregarded. With this allegation, which forms the very basis of complainants' grievance, eliminated, there is nothing remaining to support their bill.

AN ACT OF CONGRESS MAY SUPERSEDE A TREATY.

The contention, so persistently urged, that these Indians have not ceded the lands in question in accordance with the terms of the treaty of 1868, by which such lands were set apart for the use and occupation of the Indians, might very properly be dismissed with the statement that the decision of the political branch of the Government that they have been properly ceded is conclusive. The contention is without merit, however, upon another theory A later act of Congress supersedes the provisions of a prior treaty in conflict therewith. This proposition is very fully discussed in the *Head Money cases* (112 U. S., 580, 597–599); and the reasons for the rule and the principles upon which

it is found are there set forth. At the conclusion of the discussion, the court said:

> In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

Many other cases announce the same rule, among which are *Whitney* v. *Robertson* (124 U. S., 190, 194); *Botiller* v. *Dominguez* (130 U. S., 238, 247); *The Chinese Exclusion case* (130 U. S., 581, 602); *Horner* v. *United States* (143 U. S., 570, 578); *Barker* v. *Harvey* (181 U. S., 481, 488).

The first case where the doctrine was applied to Indian treaties was *The Cherokee Tobacco* (11 Wall., 616, 621). A law had been passed by Congress declaring that the internal-revenue laws should be held to extend to the taxed articles produced anywhere within the exterior boundaries of the United States. It was claimed that this provision did not have operation in the Cherokee Nation because in conflict with the provisions of the prior treaty of 1866. The court recognized the fact that the repugnancy was clear and that the two provisions could not stand together, but held that the earlier treaty must yield to the later law. After referring to the cases of *Foster* v. *Neilson* (2 Peters, 314), *Taylor* v. *Morton* (2 Curtis, 454), and *The Clinton Bridge* (1 Walworth, 155), as supporting the general proposition that a treaty may supersede a prior

act of Congress and that an act of Congress may supersede a prior treaty, the court said:

> * * * In the cases referred to these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, can not be more obligatory. They have no higher sanctity, and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the Government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

The principle was applied in *Ward* v. *Race Horse* (163 U. S., 504, 511), where the provisions of the act of Congress admitting Wyoming into the Union were found to be in conflict with a prior treaty assuring to the Bannock tribe of Indians the right to hunt upon unoccupied lands of the United States.

It was also recognized in *Thomas* v. *Gay* (169 U. S., 264, 270–271). There a treaty with the Cherokee Indians had provided that their lands should be exempt from taxation and from inclusion within the

limits of any State or Territory. Afterwards a part of these lands passed to the Osage and Kansas Indians and was subsequently, by act of Congress, included within the geographical limits of the Territory of Oklahoma. The right of the Territory to collect taxes upon cattle grazing on said lands was contested. Upon this phase of the case it was said:

> Whether, without express stipulation to that effect, the right granted by treaty to the Cherokee Nation to be exempt as to their lands from inclusion within the limits of any Territory or State passed with the grant of a portion of such lands to the Osage and Kansas Indians we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890 (26 Stat., 81), creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.
>
> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance and must be met by the political department of the Government.

The most notable instance in which Congress has exercised the authority to administer the affairs of Indian tribes by direct legislative enactment is found in the recent legislation respecting the Five Civilized Tribes in Indian Territory. By treaties entered into at various times these tribes had been removed from the East and located upon lands for which patents had been given them. The United States had in those

treaties assured the Indians the free and unrestricted control of the lands thus given them, with the single exception that they should not be sold except to the United States. The Indians were to be protected from intrusion by outsiders, were to have the right of self-government, and entire freedom from interference in their internal affairs. Time demonstrated that these, the most advanced of all Indians within the boundaries of the United States, were, under the very favorable conditions surrounding the experiment, wholly incapable of properly conducting their affairs The experiment proved a miserable failure. To rescue them from the deplorable condition resulting from their demonstrated inability to manage their business, either governmental or financial, Congress interposed its authority. Having failed to accomplish any result from an effort to arrange the matter by negotiations with the Indians, the act of June 28, 1898 (30 Stat., 495), was passed. Theretofore a commission had been provided to ascertain and make rolls of the citizens of the various tribes.

The act of 1898 provided that upon completion of the rolls of any tribe that commission should proceed to allot the exclusive use and occupancy of the surface of all the lands of such tribe among the citizens thereof, such allotments to be confirmed by the Secretary of the Interior; that the minerals in their lands should be leased by the Secretary of the Interior, who was given authority to fix the rate of all royalties to be paid by lessees; that town sites should be surveyed, laid

limits of any State or Territory. Afterwards a part of these lands passed to the Osage and Kansas Indians and was subsequently, by act of Congress, included within the geographical limits of the Territory of Oklahoma. The right of the Territory to collect taxes upon cattle grazing on said lands was contested. Upon this phase of the case it was said:

> Whether, without express stipulation to that effect, the right granted by treaty to the Cherokee Nation to be exempt as to their lands from inclusion within the limits of any Territory or State passed with the grant of a portion of such lands to the Osage and Kansas Indians we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890 (26 Stat., 81), creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.
>
> It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance and must be met by the political department of the Government.

CONTROL OF INDIAN AFFAIRS BY DIRECT LEGISLATIVE ENACTMENT—OBJECTIONS URGED TO LEGISLATION HERE IN QUESTION ARE NOT TENABLE.

as
of
nd

in the recent legislation respecting the Five Civilized Tribes in Indian Territory. By treaties entered into at various times these tribes had been removed from the East and located upon lands for which patents had been given them. The United States had in those

treaties assured the Indians the free and unrestricted control of the lands thus given them, with the single exception that they should not be sold except to the United States. The Indians were to be protected from intrusion by outsiders, were to have the right of self-government, and entire freedom from interference in their internal affairs. Time demonstrated that these, the most advanced of all Indians within the boundaries of the United States, were, under the very favorable conditions surrounding the experiment, wholly incapable of properly conducting their affairs The experiment proved a miserable failure. To rescue them from the deplorable condition resulting from their demonstrated inability to manage their business, either governmental or financial, Congress interposed its authority. Having failed to accomplish any result from an effort to arrange the matter by negotiations with the Indians, the act of June 28, 1898 (30 Stat., 495), was passed. Theretofore a commission had been provided to ascertain and make rolls of the citizens of the various tribes.

The act of 1898 provided that upon completion of the rolls of any tribe that commission should proceed to allot the exclusive use and occupancy of the surface of all the lands of such tribe among the citizens thereof, such allotments to be confirmed by the Secretary of the Interior: that the minerals in their lands should be leased by the Secretary of the Interior, who was given authority to fix the rate of all royalties to be paid by lessees; that town sites should be surveyed, laid

out, and platted and the lots therein appraised and sold under the supervision of the Secretary of the Interior; that all leases of agricultural or grazing lands made by the tribe or any member thereof prior to January 1, 1898, should be absolutely void, and all made after that date should terminate April 1, 1899; that the laws of the various tribes should not after the date of said act be enforced by the courts of the United States in Indian Territory, and that on July 1, 1898, all tribal courts in Indian Territory should be abolished. In short, the whole system founded upon the prior treaties was superseded by the provisions of this act.

It is difficult to conceive of a case involving more radical action, or that would present more clearly the question as to the authority of Congress in such matters. The question as to the right of Congress to take this action and, consequently, as to the constitutionality of that legislation, was presented to this court in the case of *Stephens* v. *Cherokee Nation* (174 U. S., 445). The court there fully sustained the power of Congress in the premises and held "the entire legislation constitutional." The contention that this act was in conflict with treaties made prior to the passage of the act of March 3, 1871 (*supra*), incorporated into the Revised Statutes as section 2079, was disposed of as follows (p. 483):

> The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is "well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial

> cognizance and must be met by the political department of the Government."

After quoting from *Cherokee Nation* v. *Southern Kansas Ry. Co.* (135 U. S., 641, 653), an extract wherein several authorities are cited to show the status of the Indian tribes as wards and the authority of Congress to exert its legislative power over them, it was said (p. 486):

> Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.

The validity of the act of June 28, 1898, was very carefully considered and fully sustained by the United States court of appeals for the Indian Territory in the case of *Tuttle* v. *Moore* (64 Southwestern Reporter, 585). Especial attention is invited to this opinion because it comes from a court which is almost continually engaged in the consideration of questions affecting the Indians.

The proposition that the United States has full power and control over the Indians, both as to persons and property, and that this control is to be administered through the political branch of the Government is, we respectfully submit, fully sustained upon principle and by authority. For its acts in such matters the political department is not answerable to any other department of the Government. That this guardianship may not have been always wisely

administered may be true, but the responsibility for any failure in the execution of the trust is with the department charged with the performance of the duties appertaining thereto. To that department, and not to the courts, must resort be had for relief from any injustice done. Whether the agency used be treaty, agreement, or direct legislative enactment, the function is still political in character and not judicial.

It is respectfully submitted that the rules and principles established by the authorities cited when applied to this case demonstrate beyond the possibility of a doubt that the grounds assigned for declaring the act in question unconstitutional are wholly insufficient, and that the complaint can not be sustained. The grounds assigned in the bill are as follows (Record, p. 13):

> *First.* That the said Indians were induced to sign the said treaty by false and fraudulent translations, and that none of those who signed said treaty understood its provisions.
>
> *Second.* That by the provisions of the Medicine Lodge treaty no part or portion of said lands could be ceded or alienated without the consent of three-fourths of the male adult members of said tribes, and that three-fourths of such male adults have never signed said Jerome treaty or any other treaty or agreement by which they ceded or alienated any portion of their said lands.
>
> *Third.* That eight months prior to the time Congress pretended to ratify said Jerome treaty 571 adult male members of said tribes, which were more than three-fourths of such number,

met in general council, with the approval of the Secretary of the Interior and the Indian agent, at Mount Scott, in said reservation, and solemnly repudiated the said treaty and prayed Congress "to cast it out and not accept it as their free act and deed."

Fourth. That in the act of Congress pretending to ratify said Jerome treaty numerous amendments, changing important provisions of said treaty, were made by Congress, and that said treaty was attempted to be put in force without submitting said amendments or the treaty as thus amended to the approval of said Indians.

The first and second reasons present matters to be considered by the legislative body preliminary to action upon the instrument or agreement, but which once considered and acted upon by that body are not the subject of inquiry by the courts. Congress, by accepting and ratifying the agreement, said that no improper means were used to secure its execution by the Indians, and that the proper parties signed it. For the courts to now say that Congress was mistaken and that there was no offer by the Indians which could have been accepted would be to arrogate to themselves the legislative functions of the Government. This court has frequently disclaimed any power or desire to do this and will do so again whenever the occasion arises.

The third reason presents a matter equally within the province of the political branch of the Government to pass upon. This matter, as well as those covered by the first and second reasons, was, according to the

statements of the bill of complaint, urgently presented to Congress and must have been considered by that body. The conclusion reached after that consideration is final and effectually forecloses the courts from inquiry in respect thereof.

Appellants seem to have virtually abandoned these three grounds. They admit in their brief here (par. 56, p. 46) that the courts have no jurisdiction or authority to consider and determine whether a treaty or act of Congress has been procured by fraud or duress, and, again (par. 93, pp. 68–69), that the question whether a treaty was duly executed by the parties authorized thereto is one solely for the political department of the Government to determine.

The fourth reason still presents matters for determination by the legislative body and not by the judiciary. If changes were made as alleged and the Indians were injured thereby, their remedy was to be sought at the hands of the political branch of the Government. Considering this agreement as governed by the same rules that apply to treaties, it is clear that the instrument, in the shape it was finally approved and published by that branch of the Government authorized to make it, must be accepted and recognized by the courts as the law of the land.

Waiving, however, all questions of consent of the Indians, and considering the matter as a direct legislative enactment, its constitutionality must be sustained because all the provisions thereof are clearly within the power of Congress to enact. Let us suppose that the agreement had

been ratified exactly as signed by the Indians and that Congress had subsequently in an entirely separate act made the provisions which are alleged by complainants to have been made in the agreement itself. It will be found that those provisions are such as Congress had full power to provide and enforce. That being so, the question as to the *power* of Congress is eliminated and that of *expediency* alone remains. The courts, as abundantly shown by authorities already cited, will not consider that question in inquiring as to the constitutionality of Congressional action. The bill of complaint purports to set forth the alleged changes with particularity. (Record, pp. 9–11.) The first adds a condition to the cession by the Indians made necessary by, and as a consequence of, the second change.

The second relieves the individual Indian of a requirement to take one half of his allotment in grazing lands, and provides for setting apart, in addition to the individual allotments provided for, of 480,000 acres of grazing lands for use in common by the Indians. No one will seriously question the power of Congress to do these things by subsequent legislation and without any agreement with the Indians. The third change is in Article V of the agreement, and, instead of providing for payment of $500,000 of the consideration for the cession at specified periods of one hundred and twenty days, one year, and two years, makes that amount immediately available to be distributed at such times and in such manner as the Secretary of the Interior shall deem for the best interests of the Indians. This is clearly the proper exercise of

the power vested in Congress to protect and advance the interests of the Indians. It presents a question of *expediency* and not of *power*. The fourth and last alleged change in the agreement consists in striking out the names of two parties who were by the original instrument to be allowed allotments of land the same as members of the tribe. A subsequent act of Congress excluding these parties from the benefits of said agreement could not have been assailed by the Indians. It would be open to attack by the excluded parties alone, if by anyone.

If these things could have been done by separate and subsequent legislative enactment, and of this there is no room for doubt, they could be done in the manner adopted in said act of June 6, 1900. No conclusion is possible under the authorities cited or upon any line of argument applicable to the circumstances of the case except that reached by the court of appeals and which is so clearly stated by that court in overruling a motion for reargument, as follows (Record, p. 47):

> We hold that it is not a judicial question of due process of law, to be determined by the courts, but that it is a political question for determination by Congress: and Congress having acted with all the facts before it, including the memorial and protest of the Indians against the act of ratification, that act of ratification is final and conclusive, and the courts have no power or jurisdiction over the subject.

In that statement the court but followed and applied the rule laid down by this court in *Barker* v. *Harvey* (181 U. S., 481, 492), as follows:

It is undoubtedly true that this Government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the Government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (sec. 16) "to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians." It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action.

LEGISLATIVE CONTROL OF PROPERTY OF WARDS.

The authority of Congress to control the property of the Indians and to make the disposition of the land oc-

cupied by them directed by said act of June 6, 1900, may be sustained upon another ground. They are the wards of the nation, and the management and care of their property, like that of minors, incompetents, or other persons not *sui juris*, is one of the subjects which the legislature may or may not submit to the courts, as it may deem proper. For a discussion of this matter reference is made to Cooley's Constitutional Limitations, sixth edition, page 117 *et seq*. The question came before this court in *Hoyt* v. *Sprague* (103 U. S., 613). The legislature of Rhode Island authorized the investment of property of certain minors in the shares of a business corporation. The business venture, after some years, failed, and the property of the minors was lost. They, after reaching their majority, sought to recover their original property, alleging, among other things, that the authorization of the investment was not a legislative but a judicial function, and beyond the legislative power.

Of this contention Justice Bradley, speaking for the court, said (pp. 633, 634):

> * * * As already intimated, it can not be doubted that the legislative power extends to the regulation of the investments and the management of minors' estates by their guardians. The legislature certainly might, if it saw fit, pass a general law authorizing a guardian to invest the property of his ward in the capital stock of a corporation engaged in manufacturing, trading, or financial operations, or in a particular class of operations, as banking, insurance, or any other that might be specified.

Usually such authority, if given, would be required to be exercised under the allowance and supervision of a court, but that would be a matter of legislative discretion. That such an authority could be conferred by law there can be no doubt. Analogous powers have been conferred from time immemorial.

* * * * *

The question of the power of a legislature, when not restrained by a specific constitutional provision, to pass special laws has been much mooted in the courts of this country; and it would subserve no useful purpose to go over the whole ground of controversy on this occasion. Suffice it to say, that laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every State in the Union and have received the sanction not only of this court, but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts the power exercised is of a legislative character, the legislature making a law

> for the particular case. In some modern constitutions the exercise of this power has been prohibited by the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the State, we can not deny to the legislature the right to exercise it in those cases in which it has been accustomed to be exercised, amongst which we think the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.

Rice v. *Parkman* (16 Mass., 326) was a case where the property of certain minors had been sold under special act of the legislature authorizing the sale. The children after coming of age brought suit against the party claiming under the sale, insisting that the special statute was void. The supreme court of Massachusetts sustained the statute, and in the course of its opinion said:

> This is a power, frequently exercised by the legislature of this State since the adoption of the constitution and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects time out of mind. Indeed, it seems absolutely necessary for the interest of those who by the general rules of law are incapacitated from disposing of their property that a power should exist somewhere of converting lands into money; for otherwise many

> minors might suffer, although having property, it not being in condition to yield an income. This power must rest in the legislature in this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.
>
> It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant and whose structure may enable them more easily to understand the merits of the particular application brought before them, but it does not follow that because the power has been delegated by the legislature to courts of law it is judicial in its character.

The same question was also considered and decided by the Mississippi supreme court in *Louisville, etc., Ry. Co.* v. *Blythe* (30 American State Reports, 599). It was there said (p. 603):

> The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special acts of the legislature authorizing or confirming the sale of lands by guardians are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights in the absence of special or exceptional constitutional limitations, and that such acts are not judicial, but the proper exercise of legislative power.
>
> Such a power necessarily resides in the legislative department of the Government, as *parens patriæ*, to prescribe such rules and regulations

as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs.

In *Henderson* v. *Dowd* (116 N. C., 195) it was said:

> This court is of the opinion that the legislature has the power to enact that the plaintiff be appointed guardian, * * * because there is no restriction on such power in the organic law. The policy is not for this court to consider. It is by the authority of the legislature that the duties of the clerk are prescribed and regulated, and if that body can delegate the execution of such duties to the clerk, it must have the power to do the same.

In *Davidson* v. *Johannot* (7 Metcalf, 388) it was said:

> The legislature has power to authorize the guardian of a person *non compos mentis* to sell a part of his ward's estate, and apply the proceeds to discharge incumbrances on other parts thereof.

In *Cochran* v. *Van Surlay* (20 Wend., 365) it was said:

> A private act of the legislature authorizing the sale of the estate of infants for their maintenance and education is within the scope of the legitimate authority of a State legislature. * * * It is clearly * * * within the powers of the legislature as *parens patriæ* to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs.

In *Wheeler* v. *Smith* (9 How., 55, 77) this court said:

> When this country achieved its independence, the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is made known to us by legislative enactment. And to this we must look in our judicial action, instead of the prerogatives of the Crown. The State, as a sovereign, is the *parens patriæ*.

This statement is referred to with approval in *Fontain* v. *Ravenel* (17 How., 369, 384), and again in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States* (136 U. S., 1, 57). In this latter case the court emphatically asserted the supreme power of Congress over the Territories, and, after a quotation from *Fontain* v. *Ravenel* (*supra*), in substance the same as that from *Wheeler* v. *Smith* (*supra*), said:

> This prerogative of *parens patriæ* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs, to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who can not protect themselves. Lord Chancellor Somers, in *Cary* v. *Bertie* (2 Vernon, 333, 342), said: "It is

true, infants are always favored. In this court there are several things which belong to the King as *pater patriæ*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics," etc.

The supreme judicial court of Massachusetts well said, in *Sohier* v. *Mass. Gen. Hospital* (3 Cush., 483, 497): "It is deemed indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons, and persons not known, or not in being, who can not act for themselves. The best interest of these persons, and justice to other persons, often require that such sales should be made. It would be attended with incalculable mischiefs, injuries, and losses if estates in which persons are interested who have not capacity to act for themselves, or who can not be certainly ascertained, or are not in being, could under no circumstances be sold and perfect titles effected. But in such cases the legislature, as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."

These remarks in reference to infants, insane persons, and persons not known or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriæ*. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic, but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes

> of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever.

As pointed out in the authorities hereinbefore referred to, the Indians are wards of the Government. They may not make contracts with respect to their property except in the manner prescribed by Congress and subject to the approval of the Secretary of the Interior. (Secs. 2103, 2127, Revised Statutes; sec. 3, act of February 28, 1891, 26 Stat., 794–5; act of August 15, 1894, 28 Stat., 286, 305; act of June 7, 1897, 30 Stat., 62, 85; act of July 4, 1884, 23 Stat., 76, 94.) They can not act for themselves. They can not protect themselves. They are clearly of that class of persons whose rights and interest must be protected and controlled by the sovereign authority, under whose jurisdiction they come, as *parens patriæ*. They are living within the geographical limits of the United States, not within the jurisdiction or subject to the control of any State, but under the control and jurisdiction of the General Government, whose sovereign will is made known by the enactments of the Congress. Furthermore, these Indians are living within one of the Territories over which Congress has full power of legislation. The extent of the authority of Congress over the Territories and over the people living in them is clearly stated in *National Bank* v. *County of Yankton* (101 U. S., 129, 133), as follows:

> * * * The Territories are but political subdivisions of the outlying dominion of the

United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

This principle is asserted in many other cases, among which are: *Murphy* v. *Ramsey* (114 U. S., 15, 44); *Mormon Church* v. *United States* (136 U. S., 1, 43–44); *Utter* v. *Franklin* (172 U. S., 416, 420); *De Lima* v.

Bidwell (182 U. S., 1, 196); and *Downes* v. *Bidwell* (182 U. S., 244, 267–269).

The prerogatives of *parens patriæ* as to these Indians is lodged in Congress, and that body has not seen fit to delegate the exercise of these powers to any judicial or other body. In this case whatever interest or claim the Indians had in the land in question was held by them not as individuals, but as a tribe, the wards of the nation, was subject at all times, in the discretion of the guardian, to change or transfer into another kind of property. This is what was done by the proceeding in question if it is to be considered merely as a legislative enactment, stripped of all questions of consent of the wards. Such a law being within the general scope of the power of Congress, the courts can not pronounce it void or inquire whether it accords with their ideas of justice.

However the matter may be viewed, the conclusion that Congress had full power in the premises and that the courts have no jurisdiction to interfere for the purpose of dictating to a coordinate branch of the Government what action it shall take in a matter thus coming within the scope of its jurisdiction is irresistible. The decree of the court below rests upon a firm foundation.

APPELLANTS' OTHER OBJECTIONS TO LEGISLATION UNDER CONSIDERATION ARE WITHOUT FORCE.

Objection is made to said act of June 6, 1900, because of the provision thereof which declares that should any of the lands allotted to said Indians or

opened to settlement under said act contain valuable mineral deposits, such deposits shall be open to location and entry under the mining laws of the United States. That this provision is not injurious to the Indians is believed to be fully shown in an opinion given thereon in the Interior Department. (31 Land Decisions, 125.) Furthermore, it is not alleged that any tract of land claimed by any allottee comes within or is affected by this provision. It is submitted that this objection could be urged only by a party claiming a tract of land affected by said provision.

A further objection is made because of the provision of said act which conferred upon the Court of Claims jurisdiction to hear and determine a claim of the Choctaw and Chickasaw Indians to the lands ceded by said agreement. This provision for a judicial determination of a long-pending controversy is not a matter of which the Indians can complain any more than can any disputant object to legislation which provides for the orderly ending of a controversy by an impartial and competent tribunal upon a full hearing. This provision is of no importance since the decision of this court in *United States* v. *Choctaw, etc., Nations* (179 U. S., 494), which finally denies a like claim of the Choctaws and Chickasaws to the Wichita lands, and therefore effectually disposes of their claim to these lands.

Furthermore, these last two provisions are not parts of the agreement, but are separate and distinct provisions of the ratifying act. If either of them can be said to be unconstitutional, a declaration to that effect

would not in any degree impugn the validity of the agreement and ratifying act as a whole, or as to any other provision.

CONTENTIONS OF APPELLANTS.

It is submitted that the questions of materiality and of controlling influence in the consideration of this matter have been presented in the foregoing pages. It is believed that the propositions upon which the argument of appellants is built have no place in the discussion, at least until the matters hereinbefore presented have been disposed of adversely to our contentions. Neither the correctness of those propositions nor the soundness of the argument based thereon is admitted.

The propositions upon which appellants base their claim to be entitled to the relief sought by this suit are, as presented in their brief, (1) that by the treaty of August 25, 1868 (15 Stat., 581, 585), certain rights in the lands in question were conferred upon the Indians which can not be abrogated or modified except by their consent, in the manner provided in Article XII, and that such consent has not been obtained; (2) that the right of occupancy given them by the treaty is a vested right which can be taken away or disturbed only by due process of law and upon the payment of just compensation; (3) that just compensation has not been allowed; (4) that said act of Congress is not due process of law, that phrase necessarily contemplating a judicial proceeding; (5) that the unconstitutionality of an act of Congress may be tested

by application for injunction to prevent the executive officers of the Government from enforcing its provisions.

CONSENT OF THE INDIANS.

The first proposition is fully discussed in the foregoing pages. Whether the Indians gave their consent to the cession of these lands was a matter for Congress to determine, and which that body did determine in the affirmative. All discussion of that question before the courts was thereby effectually and absolutely foreclosed.

> They [the courts] must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such a finding. (Cooley, Const. Lim., 5th ed., 222; *United States* v. *Des Moines, etc., Co.*, 142 U. S., 510, 544.)

The allegations of the bill of complaint herein could not have the effect of reviving this question or of making it an issue in these proceedings. Even if the fact of consent had not thus been placed without the pale of controversy, still the proposition can not be sustained, because Congress had plenary power in the premises without any such consent.

NATURE OF THE INDIAN RIGHT OF OCCUPANCY.

Here the Indian right of occupancy has been converted into property deemed by the sovereign guard-

ian to be a full equivalent, and therefore the nature of the right of occupancy and the power of Congress to terminate it at will are not necessarily involved in the discussion. However, some consideration of them may be helpful in other directions.

While the right of occupancy of an Indian tribe to lands reserved to it has frequently been referred to by this court, that right has never been judicially defined. Occupancy at common law had a well-defined and understood meaning. When speaking of occupancy as a sacred right which the Indians have in lands reserved to them, this court evidently did not intend to be understood as giving to the word "occupancy" the same meaning it had at common law, for there the right of occupancy of real estate not only involved the right of possession but carried with it the title also.

> Occupancy is the thing by which the *title* was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else. (Cooley's Blackstone, v. 1, B. 2, p. 8.)
>
> Occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty which by the law of nature, unqualified by that of society, were common to all mankind. (*Ibid.*, 257.)

The right of occupancy of an Indian tribe in lands reserved to them by treaty stipulation resembles an estate at will at common law, with this distinction,

that at common law the interest of the tenant could be determined at the will of either party, while Congress alone can determine the interest in land of an Indian tribe whose only claim is that of occupancy. Blackstone defines such an estate as follows (*ib.*, p. 284):

> An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will and put him out when he pleases.

As the right of a tenant at will to the possession of lands occupied by him was sacred to the extent that the right could not be disturbed or determined by anyone except the landlord, so the right of occupancy guaranteed to an Indian tribe by treaty stipulations is a sacred right in the sense that the courts will not permit it to be infringed or abridged by any party other than the Government, and the Government will not permit it to be interfered with by any State, foreign nation, or other Indian tribe. To this extent the authorities cited and quoted from in appellants' brief go, and no further.

This court has never said that such occupancy is a vested property right, or that it can not be impaired or extinguished by a subsequent act of Congress. On the contrary, in the cases in which the sacredness of this right of occupancy is mentioned are other state-

ments to the effect that the right of occupancy is not a vested property right, and is subject to the control of the political department of the Government, and may be impaired or terminated by act of Congress. The expression upon which so much stress has been laid by counsel for appellants was first used by Justice Baldwin in *Cherokee Nation* v. *Georgia* (5 Peters, 1, 48), in an opinion dissenting from the reasons given by the majority of the court for dismissing the bill in that case. A majority of the court held that an Indian tribe was a domestic dependent nation, saying (p. 17):

> They may, more correctly perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

In his opinion concurring in the conclusion reached, but upon very different grounds, Justice Baldwin said (p. 48):

> Indians have rights of occupancy to their lands as sacred as the fee simple, absolute title of the whites, but they are only rights of occupancy, incapable of alienation or being held by any other than common right, without permission from the Government.

He, in the same connection, proceeded to show that this right in the Indians is not repugnant to a conveyance of the fee, and "that the ultimate absolute fee,

jurisdiction and sovereignty was in the Government, subject only to such rights."

In *Mitchell* v. *United States* (9 Peters, 716) the expression occurs, and also the following (pp. 745, 746):

> Subject to this right of possession, the ultimate fee was in the Crown and its grantees, which could be granted by the Crown or colonial legislature while the lands remained in the possession of the Indians, though possession could not be taken without their consent.

That case involved an entirely different principle from that which is here contended for by appellants. The lands in controversy there were situated in Florida, a former Spanish possession. Mitchell claimed the lands through title derived from an Indian tribe who, while Florida was under Spanish control, had transferred them to Mitchell's grantors, which transfer was approved by the Spanish authorities. The laws of Spain recognized the right of Indian tribes to sell and convey lands occupied by them. The questions involved were: (1) Whether, under the laws of Spain, a perfect title to the lands had passed to Mitchell's grantors; and (2) if so, whether such transfer was protected by the terms of the treaty ceding Florida to the United States. Both questions were decided in favor of Mitchell. In the course of the opinion Justice Baldwin says (p. 752):

> But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guarantee of treaties, which

> were so highly respected that in the establishment of a military post by a royal order the site thereof was either purchased from the Indians or occupied with their permission, as that of St. Mark's.

And again (p. 758):

> The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected, and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the King.

United States v. *Cook* (19 Wall., 591) involved the question whether an Indian tribe having the ordinary Indian right of occupancy could lawfully cut or authorize to be cut timber from the land, and the court held that the Indians had no title to the lands and their right of occupancy gave them no right to cut and sell therefrom the timber which belonged with the fee to the United States. This character of right or claim falls far short of meeting the definition of a vested right.

The question involved in *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 733), cited and relied on by appellants, was not as to the power of Congress to grant lands previously reserved for occupancy by an Indian tribe, but whether the act of Congress under consideration, which was general in its terms, and which granted to the State of Kansas certain lands to aid in the construction of a railroad, should be construed to include land which had been previously

reserved to an Indian tribe under a treaty with them. It was held that the language of the act was not sufficiently specific to show that Congress intended to grant lands included in the Indian reservation, but it is clearly indicated that if specific words had been used in the act evidencing such an intention on the part of Congress such lands would have passed under the grant and the right of occupancy by the Indians would have ended. As hereinafter shown it was so expressly held in *M. K. and T. Ry. Co.* v. *Roberts* and *Spalding* v. *Chandler*. A claim having the force and effect of a vested property right would effectually have prevented any other disposition of the land by Congress. In that case, however, Justice Field filed a dissenting opinion, concurred in by Justices Swayne and Strong, holding that the act in question did include lands within the Indian reservation. He says (p. 754):

> The fee of the land was in the United States, with the right of occupation under the treaty in the Indians. Until this right was relinquished the occupancy could not be disturbed by any power except that of the United States.

In *Beecher* v. *Wetherby* (95 U. S., 517) the doctrine is distinctly recognized that the right of occupancy secured to an Indian tribe by a treaty can be terminated and extinguished by Congress. It is there said (p. 525):

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.

> The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States.

These cases, and especially the last two, instead of sustaining the position of counsel for appellants, strongly support the contention of the appellee, that Congress may terminate or extinguish the Indian right of occupancy as to all or any portion of the lands reserved by a previous treaty. No other theory could justify the use of the word "disturbed" in the one case and the words "interfered with or determined" in the other. The court did not use those terms carelessly, but because they were appropriate to express with accuracy the idea intended to be conveyed.

That this is the view taken by this court is clearly shown by the case of *Missouri, Kansas and Texas Railway Company* v. *Roberts* (152 U. S., 114), wherein was brought in question legislation granting a railroad right of way through an Indian treaty reservation without consent of the Indians and without compensation. The court said (pp. 117–118) that—

> the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration. Though the law as stated with reference to the power of the Government to determine the right of occupancy of the Indians to their lands has always been recognized, it is

> to be presumed, as stated by this court in the Buttz case, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race; the court observing, however, that the propriety or justice of their action toward the Indians, with respect to their lands, is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.
>
> * * * * *
>
> The right and power of the Government to dispose of the fee of the lands in controversy occupied by the Osage Indians with their rights of occupancy having been exercised, and a grant of both fee and possession having been made to the Missouri, Kansas and Texas Railway Company, it follows that this company, the plaintiff in error, is entitled to a reversal of the judgment. * * *

A like question arose and a similar decision was announced in *Spalding* v. *Chandler* (160 U. S., 394, 405–406), where the court said:

> The purposes of the treaty could not be defeated by the action of executive officers of the Government. (*United States* v. *Carpenter*, *supra*.) As a matter of fact, therefore, the Indian reserve continued to exist and to be used for the purposes for which it came into existence long after the President's orders of 1847. As stated, the reserve was not extinguished or the

rights of the Indians to the use of the tract destroyed or curtailed by those orders, and if the reservation for public uses and for the purposes of Fort Brady made by the President's orders was valid, the operation of those orders so far as the Indian reserve was concerned was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the Government, a cessation or abandonment of the use, *or the arbitrary exercise by Congress of its power to appropriate the same.*

* * * Whatever the reason, however, for the omission to make mention of the Indian reserve, *the power existed in Congress to invade the sanctity of the reservation and disregard the guaranty contained in the treaty of 1820, even against the consent of the Indians party to that treaty*, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the State for canal purposes.

A right to be properly denominated a *vested* right must have certain attributes which are illustrated by the case of *Society for Propagation of the Gospel, etc.*, v. *New Haven* (8 Wheat., 483), cited in appellant's brief. In this case a grant of lands was made in 1761 by the governor of the province of New Hampshire to the inhabitants of the province, to be incorporated into the town of New Haven, in which grant the society had one of sixty-eight shares. The tract was afterwards partitioned among the grantees agreeably to the laws

of the State of Vermont, of which it was then a part. Subsequently, and in 1794, the legislature of Vermont passed an act declaring lands thus granted under the authority of the British Government prior to the Revolution to be granted to the respective towns in which they lay. A perpetual lease was made to Wheeler by the town of a part of the lands so partitioned to the society. In an action in ejectment, brought by the society against the town and its lessees, the defendants claimed title solely under the act of the legislature of Vermont, and contended that by force of that act the title of the society was divested. The court held that the rights of the society were protected by the treaty of peace entered into after the Revolution; that this treaty was the supreme law of the land; that the act of 1794 passed in contravention thereof was void; and that the termination of the treaty of peace by the war of 1812 did not divest rights of property already vested under the treaty.

Other rights which have not the attributes of vested rights are illustrated in the *Chinese Exclusion case* (130 U. S., 581). The Government of China, by supplemental treaty of 1880, agreed with this Government that the latter might regulate, limit, and suspend the coming of Chinese laborers into this country without absolutely prohibiting such coming whenever, in the opinion of the latter, the interest of the country or any part of it might require such action. In 1882 Congress passed an act suspending the coming of Chinese laborers for the period of ten years, excepting from such

exclusion Chinese laborers who were in the United States on November 17, 1880, or who should come within ninety days after the passage of the act. Laborers within the exception had the right to visit China and return to the United States, provision being made for proper identification by issuing to them a certificate named.

In 1888 Congress passed another act prohibiting any Chinese laborers from entering the United States, whether they had theretofore been residents of the country or not. Chae Chan Ping, a Chinese laborer and a subject of the Chinese Government, had resided in the United States from 1875 until June 2, 1887, when he left for a visit to China, having in his possession a certificate such as the anti-Chinese laws then provided for, to enable him to return to this country. In September, 1888, he sailed from Hongkong for San Francisco. On his arrival the United States officers refused him permission to land, solely on the ground that the act of 1888 had annulled his certificate and his right to return. His petition for a writ of *habeas corpus* was denied by the United States circuit court, and upon appeal to this court that decision was affirmed. He claimed that by virtue of the treaty with China and the laws of Congress passed prior to the act of 1888 his right to return to the United States was a vested right, and in so far as the act of 1888 conflicted with such right it was unconstitutional and void. The Supreme Court held that such right was not a vested one, and that it could be destroyed or extinguished by subsequent legislation.

The only claim the Indians assert is that arising under the treaty of 1868, and to determine whether it is a vested right it is necessary to find whether it comes within the definitions of such rights. A vested right under a treaty was defined in the *Chinese Exclusion case* as follows (p. 609):

> The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character.

The right of occupancy here claimed was not capable of sale, transfer, or other disposition.

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 488) it is said:

> We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, in the manner provided, who are entitled to citizenship in each of the tribes, and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which

> the right to a share in the latter would not necessarily follow from the concession of the former. *But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership,* and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

The contention that the Indians had a vested right in these lands is not sustained.

THE COMPENSATION PAID THE INDIANS.

If the conclusion reached that this claim of the Indians did not amount to a vested right is correct, the other propositions submitted by appellant's brief must fall, and it is, perhaps, unnecessary to discuss them. We deem it not inappropriate, however, to refer to them very briefly. It is contended in argument that just compensation was not paid to the Indians, but there is no specific allegation in the bill upon which this argument can be based. It is stated in the bill (record, p. 9) that the price to be paid for the surplus lands is so far below their real value "as to require a court of equity administering the laws applicable to guardians and wards to set aside the sale as contrary to equity and good conscience." This averment might be apropos if the Indians held the full title to the lands, but it is not pertinent under the facts in this case. It is admitted that the Indians had only the right of

occupancy, the fee being in the United States, and there is no allegation as to the value of this right or that the compensation allowed for it was inadequate. For the tribal right of occupancy in about 2,000,000 acres of land each individual Indian was given absolutely 160 acres of land, amounting in all to about 480,000 acres. A like quantity of 480,000 acres was also reserved and set apart for their use in common as pasturage, and the sum of $2,000,000 is to be paid, a part of which ($500,000) is to be distributed to them per capita and the balance deposited in the United States Treasury to the credit of the Indians and to draw interest at the rate of 5 per cent per annum, to be paid to them per capita annually. It is submitted that the price thus to be paid is not obviously inadequate, and that the arrangement is not on its face contrary to any idea of fair dealing.

DUE PROCESS OF LAW.

Counsel for appellants admit that the only right the Indians had in the lands was that of mere occupancy, yet their argument is based on the theory that they had an absolute ownership in them. Proceeding upon this theory, counsel say that the act of June 6, 1900, is in violation of that part of the fifth amendment to the Constitution which provides that no person shall be deprived of property without due process of law, and adds that what is due process of law is a judicial and not a political question.

The transaction in question here did not deprive the appellants of property or any other property right such

as is contemplated by said amendment, but merely changed the form of such property, if property it be, and hence it does not fall within the inhibition of the amendment. But even though such occupancy be property or a property right within the meaning of said amendment, both the spirit and the letter of the amendment have been observed in dealing with it in this case. Due process of law, or according to the law of the land, does not in all cases mean a hearing before and a determination by a judicial tribunal. It is not always a question for the courts to determine. It is generally a judicial question for the courts to determine when a private party undertakes to interfere with or deprive another of property or property rights. But, as was said by Justice Curtis in *Murray's Lessees* v. *Hoboken Company* (18 How., 272, 284–285), "Even in a suit between private persons to try a question of private right, the action of the executive power upon a matter committed to its determination by the Constitution and laws is conclusive," citing *Luther* v. *Borden* (7 How., 1); *Doe* v. *Braden* (16 How., 635). But when property is appropriated or interfered with by the Government for public use, due process of law becomes a political question. Upon this subject Justice Cooley, in his work on Constitutional Limitations, sixth edition, says (p. 434):

> In judicial proceedings the law of the land requires a hearing before condemnation and judgment before dispossession; but when property is appropriated by the Government to public uses, or the legislature interferes to give

direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Private rights may be interfered with by either the legislative, executive, or judicial department of the Government. The executive department in every instance must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action.

Upon this question this court, in *Murray's Lessees* v. *Hoboken*, *supra*, says (p. 284):

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time

there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. (*Foley* v. *Harrison*, 15 How., 433; *Burgess* v. *Gray*, 16 How., 48; ———— v. *The Minnesota Mining Company*, at the present term.)

UNCONSTITUTIONALITY OF ACT OF CONGRESS NOT GROUND FOR INJUNCTION AGAINST EXECUTIVE DEPARTMENT TO PREVENT ITS EXECUTION.

In support of the proposition that the court will, by injunction, interfere to prevent the execution of an act of Congress on the ground of its unconstitutionality, counsel for appellants have cited *Board of Liquidation et al.* v. *McComb* (92 U. S., 531); *Osborne* v. *Bank of the United States* (9 Wheat., 739); and *Davis* v. *Gray* (16 Wall., 203). In each of these cases the injunction was asked and obtained against

State officers to prevent them from enforcing the provisions of a State law which was in conflict with the Constitution of the United States.

In *Mississippi* v. *Johnson* (4 Wall., 475, 499–500) it is said:

> It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.
>
> It was admitted in the argument that the application now made to us is without a precedent, and this is of much weight against it.
>
> Had it been supposed at the bar that this court would in any case interpose by injunction to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.
>
> Occasions have not been wanting.
>
> The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.
>
> And yet it is difficult to perceive upon what

> principle the application now before us can be allowed and similar applications in that and other cases have been denied.
>
> The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.
>
> It will hardly be contended that Congress can interpose in any case to restrain the enactment of an unconstitutional law, and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished in principle from the right to such interposition against the execution of such a law by the President?
>
> The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are in proper cases subject to its cognizance.

Here, as there, the effort was to restrain action by the Executive under legislation alleged to be unconstitutional. The act of June 6, 1900, contained a direction as follows:

> That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made.

This suit was brought before the President had issued his proclamation. While the suit was formally brought against the Secretary of the Interior and other officers

of the Interior Department, the purpose was to prevent any steps being taken toward opening said lands to settlement, entry, and disposition under said act. The purpose of the Indians in these proceedings is stated in the brief of their counsel, as follows (p. 59):

> They seek principally to enjoin the Secretary of the Interior and all other officials of the Government from opening their lands to settlement by white people without their consent and in violation of property rights, secured to them by the solemn provisions of a treaty, which is the supreme law of the land.

The acts to be done and performed by the appellees here were but incidents following upon the proclamation of the President and necessary to carry it into effect. In the absence of such a proclamation appellees could not open to settlement or disposition the unallotted lands; could not in any manner receive entries for or otherwise dispose of or encumber such lands, and could do absolutely nothing which would be injurious to the Indians. This suit was in effect to restrain the Secretary of the Interior and other officers from carrying into effect a proclamation of the President not then issued or determined upon; its purpose was to prevent by injunction the execution of said law by the President, and therefore the decision in the case last cited is exactly in point.

However, it is unnecessary to discuss the abstract question as to the action that would be taken by the courts to prevent the execution of a law found to be unconstitutional, because, in the case at bar, an injunc-

tion is asked to prevent the executive department of the Government from enforcing an act of Congress concerning a matter that is purely political in its nature.

NO MINISTERIAL ACT INVOLVED HERE.

Counsel for appellants discuss (pars. 60–67) at some length the difference "between acts of executive officers which are political or quasi judicial, and therefore not reviewable by the courts, and those acts and duties which are not political or quasi judicial, but which are subjects of judicial cognizance and control." In the cases cited this court asserted authority to compel an executive officer to perform a duty involving no exercise of discretion on his part and peremptorily commanded by law to be done; that is, a mere ministerial act, or to prevent the doing by an executive officer of an act in violation of or not warranted by law. As shown by a much longer line of decisions not necessary to mention specifically, the rule is laid down that the courts will refuse to interfere with or attempt to control executive officers in the discharge of duties involving the exercise of discretion. We submit, however, that all this has no place in the discussion of the questions involved here. The subject-matter here is political in its nature as contradistinguished from judicial. It is within the jurisdiction of the legislature as the political branch of the Government and not within that of the courts as the judiciary branch. The authorities cited by appellants do not in the slightest degree tend to controvert that proposition, and we venture the assertion that none can be found that do controvert it.

MISTAKES IN BRIEF OF APPELLANTS, AND BRIEF ANSWER TO SOME POINTS THEREIN.

In the first paragraph of their brief counsel for appellants correctly quote an extract from the opinion of the court of appeals of the District of Columbia in this case, but in the next paragraph they make the mistake of saying: "This is an historical error." The court was not attempting to recite the history of dealings with the Indians, but to state the principles of law which govern their holdings of lands. The fact, if it were such, that the United States has never found it necessary to exercise the power to change the Indians from one locality to another, as may best serve the welfare of the Indians and the purposes and policy of the Government, does not disprove the existence of the power, nor does it change the tenure by which the Indians hold the lands occupied by them. This error on the part of counsel in assuming that history, instead of law, controls, pervades all their brief, and renders nugatory many of the propositions upon which they apparently place great reliance.

Paragraphs 2, 3, 4, and 5 are devoted to recitation of so-called historical facts.

In paragraph 6 counsel quote two extracts from the American and English Encyclopedia of Law as sustaining the proposition that the right of the Indians to lands occupied by them can be extinguished only by their consent, and say the text is supported by numerous Federal and State authorities cited in notes under the propositions quoted. The cases thus cited from this court have all been referred to elsewhere herein,

except *Clark* v. *Smith*, 13 Pet., 195; *Doe* v. *Wilson*, 23 How., 457; *Butts* v. *Northern Pacific R. R. Co.*, 119 U. S., 55; *Spalding* v. *Chandler*, 160 U. S., 394; and *Fee* v. *Brown*, 162 U. S., 602. An examination of these cases shows that they do not sustain the proposition asserted. Inasmuch as counsel has not specified any statement in any one of these decisions as being in point, we will not undertake to analyze each of them here. They all assert that the fee of such lands is in the United States, the Indians having only a right of occupancy which, as said in *Clark* v. *Smith*, "was protected by the political power and respected by the courts until extinguished." In *Spalding* v. *Chandler*, which involved a Congressional grant of a right of way through an Indian reservation, without consent of the Indians or compensation to them and in contravention of treaty stipulations, it was said (p. 407):

> The power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of 1820, *even against the consent of the Indians*, party to that treaty, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of the act was to extinguish so much of the Indian reserve as was embraced in the grant to the State for canal purposes.

This last case not only controverts the proposition in support of which it is cited, but also demonstrates the inaccuracy of the historical statement upon which appellants place such great reliance.

The cases from other United States courts do not support the proposition. In *United States* v. *Flournoy, etc., Co.* (69 Fed. Rep., 886, 893) no question as to the extinguishment of the Indian claim to lands was involved. In *United States* v. *Alaska Packing Association* (79 Fed. Rep., 152, 157) the court cited and followed *Spalding* v. *Chandler, supra.* In *Northern Pacific R. R. Co.* v. *Dudley* (85 Fed. Rep., 82, 84) the court, speaking of the Indian right of occupancy, said:

> *It is true as against the Government, it constitutes no barrier, and it has always been unceremoniously brushed aside when in conflict with the Government's interest; but, at the same time, it has been considered a title so sacred and valid that no other party can ever disturb it without the consent and authority of the Government.*

United States v. *Pine River, etc., Co.* (89 Fed. Rep., 907, 912) cites *United States* v. *Cook* (19 Wall., 591) and *Beecher* v. *Wetherby* (95 U. S., 517) as defining the Indian claim to lands occupied by them. In *United States* v. *Four Bottles Sour Mash Whiskey* (90 Fed. Rep., 720, 722) it is said:

> It is also settled by the decisions of the Supreme Court that the Government of the United States is the primary and ultimate source of title to the public domain, and the Indians are not recognized as having any title, except the mere right of occupancy, *which Congress has the right at any time to extinguish.*

In paragraph 7 reference is made to a New York State authority, which is cited and quoted from as a conclusive authority. Whatever respect that decision

may command as to the relations between the State of New York and the Indian tribes residing there, and that was the only question involved or referred to there, it can not be accepted as of conclusive effect here.

Paragraphs 8 and 9 repeat the mistake of considering history rather than law as the controlling factor in this discussion.

Paragraphs 10 to 21 are devoted to a discussion of the character of the Indian right of occupancy, which matter is fully discussed elsewhere herein.

Paragraphs 22 and 23 discuss this transaction as merely a contract, whereas it involves much more than that, namely, the exercise of the sovereign power of the Government.

Paragraphs 24 to 26 assert that the question involved here is not political, but that matter has been referred to elsewhere herein, and it is unnecessary to now take up space and time in further consideration of it.

In paragraph 27 appellants refer to and quote from the decision in *New York Indians* v. *United States* (170 U. S., 1, 23) as being exactly in point in this case. The quotation given is taken from the middle of a paragraph and without the context does not fairly present the position of the court. This court said that the provision being considered there was not found in the original nor in the published copy of the treaty nor in the proclamation of the President, which purported to give the treaty word for word, and that it

never received the sanction or approval of the President, a part of the treaty-making power. Counsel for appellants say (par. 28, brief):

> This proviso was passed by the Senate and thus became a part of the treaty so far as that body was concerned, and the treaty is so printed in the volume entitled Revision of Indian Treaties, page 550. But by some mistake the proviso was not submitted to the Indians for their approval, with the other Senate amendments, and was not proclaimed by the President as a part of the treaty. However, as the treaty was printed officially, the proviso appeared as a part of the text.

An examination shows that neither the resolution nor the proviso thereto referred to by this court appears as a part of or in connection with said treaty as officially printed in 7 Statutes at Large (pp. 550–564) or in Revision of Indian Treaties (pp. 548–560). The treaty contained a provision (article 3) that such of said tribes "as do not *accept and agree to remove*," etc., should forfeit all interest in the lands set apart for them. This is the provision the counsel had in mind in their discussion here. The matter to which the court referred is found in a Senate resolution to which there was a proviso: "That if any portion or part of said Indians do not *emigrate*," etc. This mistake upon the part of counsel evidently led to the erroneous statement that the official publication of the treaty embraced the provision referred to by the court in said case, and the consequent contradiction of the statement made by the court.

Considered as a historical precedent, this case of the New York Indians strongly supports the position of the Government in the case at bar. Under Congressional enactments the treaty lands in Kansas (to which the Indians had a much higher right and title than was given by the Medicine Lodge treaty) were disposed of as public lands without consent of the Indians and without provision for their compensation. The power of the Government to do this and the title of the Kansas purchasers were not questioned. The political branch of the Government in recognition of the claim asserted before it, did, in the exercise of its exclusive authority, authorize the Court of Claims, and this court upon appeal, to hear and determine the claim and award appropriate compensation to the Indians. Everything done and said in that case is consistent with the established view that Congress, in the exercise of its authority over tribal Indians and tribal lands, can dispose of the lands, and that if any injustice is done the Indians in the exercise of that power, "the remedy is with the political department of the Government." (*United States* v. *Choctaw, etc., Nations*, 179 U. S., 494, 535.)

In paragraphs 29 to 33 counsel assert and attempt to support the proposition that the Indians had a vested right of property in the lands in question, which proposition has been noticed and, we submit, disproved elsewhere herein.

The propositions put forward and discussed in paragraphs 34 to 38, as to the character of the Indian

claim, and in 39 to 44, as to what constitutes due process of law, and also in 45 to 48, have been considered at different places herein and need not be taken up again.

Paragraph 49 involves an error of statement, inasmuch as many adjudicated cases, as has been shown, have recognized the right of Congress to terminate the Indian right of occupancy at any time and in such manner as may seem to that body appropriate.

The proposition set forth in paragraph 50, that Indians have rights, is not disputed. But those rights and the protection of the Indians in their enjoyment, as between them and the Government, lie with the political branch of the Government, and not with the judiciary.

The attempt in paragraphs 51 to 55 to controvert the proposition that due process of law does not always mean a hearing before and determination by a judicial tribunal has wholly failed.

In paragraph 56 appellants practically abandon one of the main features of their bill of complaint, viz: The effort to have it declared that the Jerome agreement was fraudulently procured.

The subjects discussed in paragraphs 57 to 68 have all been treated of at other places herein.

Paragraphs 69 to 74 relate to the proposition that Indians may sue in the courts. We are willing that the case at bar should be determined upon other grounds, and hence submit nothing upon this question.

As opposed to the statements in paragraphs 75 and

76, attention is invited to the President's proclamation of July 4, 1901. (See Presidential Proclamations, p. 11, at end of acts of first session, Fifty-seventh Congress.)

If the Indians have the lawful capacity to accept or reject proposals for the disposition of the lands occupied by them, as claimed in appellants' brief, they have equal capacity, by subsequent conduct and acceptance of advantages, to estop themselves from questioning such disposition when made without their prior consent; and if they are without such capacity, the necessity for the guardianship of Congress must be conceded.

Paragraphs 77 to 88 are devoted to a discussion of the decision of Justice Bradley, of the supreme court of the District of Columbia, and the authorities cited therein. The decision and the authorities speak for themselves, and an examination of them sustains the decision.

Paragraphs 89 to 97 refer to and comment upon some of the cases cited by appellees in the court below. These same authorities are cited in this brief, and we do not feel that the comments made by appellants require further discussion.

In paragraph 98 counsel for appellants assert that the act of June 28, 1898, has been regarded by all persons familiar with conditions in Indian Territory as coercive in its nature and as intended to constrain the Five Civilized Tribes to enter into agreements with the United States. This court will not inquire into the

motives of Congress in passing that act. If such was the purpose of Congress, that fact would not impair its importance as an assertion by Congress of its power in the premises. Neither does the fact that other provision has since been made in respect of the Cherokees destroy the force of said act as a legislative precedent. It may tend to show that Congress exerts the full measure of its authority only when there is urgent public necessity therefor.

The contention in paragraph 99 that the decision of this court in *Stephens* v. *Cherokee Nation* (174 U. S., 445) must be taken as referring only to the provisions of said act of 1898, relating to citizenship, has been referred to hereinbefore.

Paragraph 100 contains a recitation not material to this case, and an imputation as to the motives of the Secretary of the Interior in making certain recommendations to Congress in respect of matters therewith submitted for legislative action which merits no notice for the purpose of refutation, and is remarkable only because not to be expected from counsel of the high character of those presenting the brief in which it is found.

Paragraph 101, and the last, states that "there is some doubt even as to whether Congress really intended to ratify the so-called Jerome agreement." There is nothing to support this statement, and it was probably not expected it would be taken seriously.

STATEMENTS IN BILL TOO GENERAL AND INDEFINITE.

In addition to the objections hereinbefore urged against the bill here, in respect to the subject-matter,

there are other points of objection that should be noticed. The averment as to the inadequacy of the compensation is not, as before shown, pertinent under the facts. Furthermore, the averments as to the important matters of fraud and deceit are not sufficiently definite to entitle them to consideration, and upon that ground alone the demurrer should be sustained. It is charged that the signatures to said agreement, ratified by the act of June 6, 1900, were obtained by "certain false and fraudulent representations:" that the interpreters "falsely and fraudulently misrepresented the provisions of said treaty, so that as signed it did not express the wishes of the Indians." What particular part of the agreement, called in the bill "treaty," was misrepresented or misinterpreted is not pointed out. The court is entitled to be specifically informed on this point, that it may determine whether the alleged misinterpretation and misrepresentation were as to any material part of the instrument. Where fraud is charged, the averments must be explicit and specific, not vague and general, as here. The writ of injunction will be granted only when a clear right thereto has been shown, and for this reason the petitioner therefor must state fully and clearly the facts and particulars upon which his petition is based. The necessity for particularity and definiteness in the allegations is especially imperative in a case like this, where the claim to the writ is based solely upon the alleged unconstitutionality of an act of Congress. Since the courts will not

declare an act of Congress void for repugnancy to the Constitution "except in a clear case," a petition asking such a judgment should make out such a case, which could be done here only by showing that the alleged false translations and misrepresentations referred to some material part of the agreement. The court should not be called upon to hear or the respondents to answer the vague and general allegations of this bill as to fraud and misrepresentation.

As said before, the complainants have virtually abandoned all contentions based upon allegations that said agreement, called treaty in the bill, was procured by fraud and misrepresentations, since they concede that the courts have no jurisdiction or authority to consider and determine whether a treaty or act of Congress has been procured by fraud or duress.

CHANGES IN AGREEMENT ARE ADVANTAGEOUS TO INDIANS.

There is no reason for complaining of the changes alleged to have been made in said agreement before its ratification by Congress upon the ground that they worked any injury to the Indians or did them any injustice. An examination of the alleged changes as set forth in the bill (record, pp. 9–11) discloses that in every instance the change was in the interest and for the benefit of the Indians. The first item shows an added condition upon the United States. The second item, following out that condition, shows that, in addition to the allotments provided for, the Indians were to have set aside for their use in common 480,000 acres, which would be equivalent to

another 160 acres for each member of the tribes. The third item shows a change as to the manner of payment of the money to go to them, made evidently for the better safeguarding of their interests. The last item shows the striking off of the names of two persons who had been included in the benefits of the agreement. The fact that these two names had been inserted in the original agreement is mentioned in another part of the bill (record, p. 5) as a ground of complaint. These changes, instead of working any injury to the Indians, were calculated to inure to their advantage and serve to illustrate the purpose and care of Congress to fully protect them.

THE INDIANS HAVE ASSENTED TO THE AGREEMENT AND ALL AMENDMENTS.

It appears by public documents, of which the court will take judicial notice, and by the records of the Interior Department, of which the court can also take judicial notice (*Knight* v. *U. S. Land Association*, 142 U. S., 161, 168–169), that complainants here, and all other members of the tribe, both as individuals and as a tribe, have accepted the benefits of this legislation. The proclamation of the President of July 4, 1901 (see appendix of Proclamations in acts of first session Fifty-seventh Congress), shows that all allotments provided for by said agreement have been selected and approved, and that lands for the use of said tribes in common have been set apart as therein provided. If it be said that Congress could not act in the absence of consent by the Indians,

yet it must be held that the Indians, by accepting the benefits of the agreement with the amendments thereto, have thereby signified their assent to and approval of the action taken by Congress. If the Indians were, as claimed, free to accept or reject the provisions of said act, the time of exercising their discretion is not material; but having indicated acceptance both as individuals and as a tribe by receiving the benefits of the legislation, they will not be heard to afterwards object that said act is in violation of the Constitution. (Cooley's Constitutional Limitations, p. 214, 6th ed.; Black's Constitutional Law, sec. 35.) The rule is stated by Mr. Black as follows:

> Persons may also become estopped from denying the constitutionality of a statute by participating in the procurement of its passage, by acquiescing in it after its passage, or by accepting benefits under it, although it may be invalid as to all other persons.

Upon this subject Mr. Cooley says

> There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on

> compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege if he received the compensation awarded or brought an action to recover it.

The principle is recognized and applied by this court in *Lindsey and Phelps Co.* v. *Mullen* (176 U. S., 126, 146). A statute of Minnesota authorizing the formation of companies for improving streams in the State and for driving, holding, and handling logs therein contained a provision giving such a company a lien upon all logs so handled to pay the tolls, costs, and expenses incurred. The logs of the plaintiff had been seized to pay the expenses connected with a boom which included other logs than theirs. This court held the lien good upon the theory that when a log owner decided to avail himself of the boom it could not be said that he was deprived of his property without due process of law, if he was compelled to subject it to the conditions which the legislature prescribed for the use of such boom.

The doctrine has perhaps been most frequently applied in cases involving alleged unjust taxation. In *Wight* v. *Davidson* (181 U. S., 371) several authorities bearing upon the subject were cited, and it was said (p. 377):

> The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

The principle is again expressly recognized in *O'Brien* v. *Wheelock* (184 U. S., 450). There the court held that the legislation involved in that case was invalid and could not be given effect by the doctrine of estoppel, but in respect to this conclusion said (p. 491):

> The result is not inconsistent with the cases that hold that although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law, and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.

Accepting, for the purpose of the argument only, the contention of the appellants that this legislation is to be considered only as a contract between the United States and the Indians, the statement last quoted is peculiarly pertinent.

IN CONCLUSION.

It is respectfully insisted that the course pursued was for the best interests of all concerned. The Indians had at the most a right of occupancy, the fee to the land being in the United States. That right of occupancy rested in the Indians as a tribe and not as individuals. No one of them could assert a right in a particular tract of the territory thus occupied that would justify him in making a permanent home thereon. He had no interest in any tract or in the land as a whole which he could dispose of, which he could

assert if he ceased to be a member of the tribe, or which would pass to his heirs at his death. There was nothing in his connection with the land that tended to his civilization or improvement, financially, or otherwise. The reservation had come to be surrounded by populous white settlements; the wild game had been exterminated; support by the chase was no longer possible, and the last of the thirty installments of clothing and provisions promised by the treaty of 1868 had been delivered. The Indians had not become self-supporting and had made no advance in that direction which would justify a hope that they ever would become so under the old system. It was not only the right, but the imperative duty of the United States to change this condition of affairs and to make such provision for these people as would start them upon the road to self-support and civilization.

To successfully accomplish this it was necessary that each individual should be invested with the ownership of a tract which he should look upon as his own and sufficiently large to justify the belief that it would afford him a support. The indefinite, intangible, undivided, and indivisible interest of the individual in the tribal right of occupancy must be replaced by a defined, separate, and distinct personal right in and to a specific tract of land. Hence the first care was to allot to each individual member of the tribes 160 acres, with a promise of ultimate absolute ownership. As a measure for the further protection of the Indian a like quantity of land was set apart for the use in common of

the tribes. To furnish means for the building of houses, the purchase of farm implements, the opening up of farms, and the means of subsistence for a time, it was necessary that the tribal right of occupancy as to the lands not needed for individual allotments or for making up the quantity to be set aside for tribal use be converted into funds which could be used for those purposes. This also was done. Whether the sum fixed upon represented the full value of the right given up by the Indians it is impossible to say with absolute certainty. There is no measure of value of such right as they held. The complainants allege that the price fixed was far below the real value of the land, but do not say it was below the value of the qualified claim of the Indians. The facts before the court do not present any ground, legal or equitable, for the interference of the courts, and the decree of the court dismissing the bill should be affirmed.

WILLIS VAN DEVANTER,
Assistant Attorney-General.

O